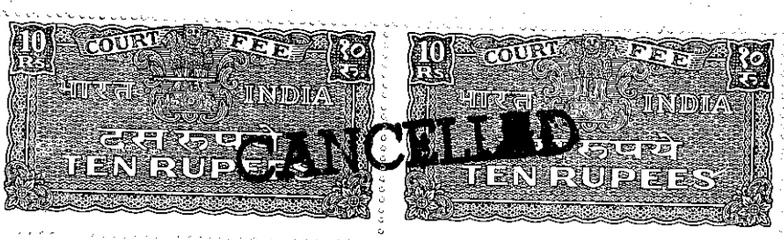

CF 20/

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

MISC. APPEAL NO. 530 OF 2003

Single Bench

Appellant
(Non-Applicant) : Kailashpati, ~~Daughter of~~ Kishan Sahu, aged about 35 years, Occupation - Housewife, present resident at village - Udaypur, P.S. Lakhanpur, Tahsil - Ambikapur, Distt : Surguja (C G).

P. R. No. 1418/03
Presented by Shri A.K. Sahu
dated 25/06/03

VERSUS

Respondent
(Applicant) : Sudha Ram Sahu, Son of Mena Ram Sahu, aged about 46 years, Occupation : Govt. Servant (Teacher), resident of Village - Patkura, P.S. Lakhanpur, Distt : Surguja (C G).

MEMORANDUM OF APPEAL UNDER SECTION 47 (a) OF GUARDIANS & WARDS ACT.

30

HIGH COURT OF CHHATTISGARH AT BILASPUR

M.A. No. 530/2003

Appellant Kailashpati

Versus

Respondent Sudha Ram Sahu

Post for 21/03/2005

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

M.A. No. 530/2003

Appellant Kailashpati

Versus

Respondent Sudha Ram Sahu

Shri V.K.Pandey counsel for the appellant.
Shri Manoj Paranjpe counsel for the respondent.

ORDER

(Passed on 21-3-2005)

This appeal has been preferred under Section 47(a) of the Guardian and Wards Act against the judgment and decree dated 29/03/2003 passed by First Additional District Judge; Ambikapur in Misc. Civil Suit No. 02/2002 by which the application of the appellant /non-applicant filed under Section 7 of the Guardian and Wards Act read with Section 6 of the Hindu Minority and Guardianship Act has been allowed and custody of the minor son Vinay Kumar born in the year 1993 has been ordered to be handed over to the respondent/applicant.

-2

2. Case of the respondent/applicant before the Court below was that he was married to one Dev Kumari. However, later on he came into contact with the appellant/non-applicant in the year 1988 and engaged her for his domestic work. During her stay at his residence, they both developed physical relationship resulting in the birth of minor Vinay Kumar. The appellant/non-applicant was living with the respondent/applicant as kept with the consent his first wife. It was also alleged that the appellant/non-applicant was married to one Dharampal in the year 1987 with whom she lived as wife for one and half years. In the meanwhile, the appellant/non-applicant developed illicit relationship with one Dev Narayan of Village Patkura which was discovered by the respondent/applicant in May 2001. Thereafter appellant/non-applicant left the house of the respondent/applicant without intimating him and went to her parental house.

3. Contention of the respondent/applicant was that as she was an unmarried lady, he married her as per the custom because he had no male issue from his first wife. Thereafter she lived with the respondent/applicant as his wife till 1994-95. Two sons were also born out of the wedlock but later on one of the sons died when he was seven years old. Respondent/applicant subsequently started neglecting and harassing her. In the year 2001 the respondent/ applicant turned her out of his house. The allegation of infidelity was denied by him. It was also denied that the appellant/non-applicant was married to one Dharampal. However, after living in the company of the respondent/applicant, the appellant/non-applicant moved an application for maintenance under Section 125 of the Code of Criminal Procedure which is pending and the Civil Suit on behalf of the minor,

Vinay Kumar was filed by the respondent / applicant for establishing his legal right as the son of the respondent/applicant.

4. Learned trial Court framed issues and allowed the application of the respondent/applicant on the ground that he is a teacher and has maintained the minor till date and made arrangements for his studies. The Court below acting upon the admission of the appellant/non-applicant in her application for maintenance that she is hardly able to maintain herself, has arrived at the conclusion that the respondent/applicant being a teacher would be in a better position to take care of the welfare of the child whereas the appellant/non-applicant has no permanent source of income and thus the impugned order has been passed.

5. Learned counsel for the appellant/non-applicant assailed the impugned order on the following grounds :-

i) Even according to the admission of respondent/applicant, the minor is his illegitimate child and therefore as per the provisions of Section 6 (b) of the Hindu Minority and Guardianship Act, the appellant/non-applicant is the natural guardian of the minor and as such the custody ought to have been given to him.

ii) The minor who is now aged about 12 years is living with the appellant/non-applicant without any complaint and pursuing his studies whereas respondent/applicant has a married wife and two daughters born through her and therefore the welfare of the minor cannot be considered to be safe in the hands of step mother because in such cases, the welfare of

the minor is a paramount consideration according to Section 13 of the Hindu Minority and Guardianship Act.

iii) On the other hand, learned counsel for the respondent/applicant submits that from the perusal of the reply of the appellant/non-applicant it is evident that she herself has admitted that she was a legally wedded wife of the respondent/applicant and lived with him as his wife and thus this argument has rightly been not accepted by the Court below.

6. I have heard counsel for the parties and gone through the material available on record including the evidence adduced by the parties.

7. The finding of the Court below that in the present case provisions of Section 6(b) of the Hindu Minority and Guardianship Act 1956 has no application and it is not open to the appellant / non-applicant to claim to be the natural guardian in view of the provisions of Section 6 (b) of the Act of 1956, is without any basis because from the perusal of the pleadings of the respondent / applicant it is manifest that appellant / non-applicant is his kept and as such it was not open for him to claim to be the natural guardian of the minor in view of the provisions of Section 6(a) of the Act of 1956 and as such the onus to prove that he was the natural guardian of the minor was on the respondent / applicant but he has failed to do so.

8. The second ground on which the application of the respondent / applicant has been allowed is that he is a teacher and as such he would

be in a better position to look after the interest of the minor. As the welfare of the minor can not be measured by money nor by physical comfort the High Court of M.P. in the matter **of Sardar Bhupendra Singh Vs. Smt. Jasbir Kaur reported in AIR 2000 M.P. 330** has categorically held that the word "welfare" has a wider meaning and moral and religious welfare as also the physical being of the child must be considered and the financial status of the father should not come in the way while determining the custody of the minor. Similarly as regards the contention of the respondent / applicant raised in the application under Section 125 of the Code of Criminal Procedure, it can not be said that the interest of the minor would not be served in her parental house.

9. Learned counsel for the appellant / non-applicant relying on the judgment of **M.P. High Court in the matter of Ram Kawal Yadav Vs. Smt. Pratibha Yadav reported in 2002 (2) MPLJ 30,** submits that it can not be said that interest of the minor would not be served merely because the mother filed an application for maintenance under Section 125 of the Cr. P.C. and the custody of the minor with the mother can not be refused as such. He further submits that while deciding the question of custody of the minor paramount consideration should be the welfare of the child.

10. In the present case admittedly the respondent / applicant is living with his married wife and he himself has stated that mother of the minor is not his married wife but a kept whereas the minor is residing with his mother and perusing the studies being with her. In these circumstances this Court is of the opinion that the welfare of the minor shall be with the mother i.e. appellant/non-applicant and the

Court below has ignored this aspect of the matter while allowing the application of the respondent / applicant by the impugned order.

11. In view of the aforesaid analysis, the appeal is allowed and the impugned order passed by the Court below is set aside.

Sd/-
Dhirendra Mishra
Judge

Jyotishi